No. 76-1193

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

ESTELLE JACOBS, A/K/A "MRS. KRAMER"

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

CITATIONS

244-302—77——1

Cases—Continued

Cases—Continued

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OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. A, pp. 1A–14A) is reported at 547 F. 2d 772. The first opinion of the court of appeals (Pet. App. B, pp. 15A–22A) is reported at 531 F. 2d 87. The opinion of the district court (Pet. App. E, pp. 26A–32A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1976. On January 21, 1977, Mr. Justice Marshall extended the time within which to file a

petition for a writ of certiorari to and including February 28, 1977. The petition was filed on that date and was granted on May 31, 1977 (A. 85). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals possesses and should exercise supervisory power to suppress a defendant's allegedly perjurious grand jury testimony for the sole reason that the prosecutor neglected to follow the usual practice of other federal prosecutors in the circuit of giving "target" warnings to grand jury witnesses against whom the government has incriminating evidence.

STATUTE AND RULE INVOLVED

18 U.S.C. 3501 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> * * * * *

> (e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authortiy. Evidence which is not relevant is not admissible.

STATEMENT

1. During May 1973, in the course of her employment by a debt collection agency, respondent made numerous telephone calls to relatives of a delinquent gambling debtor she was attempting to locate (A. 5, 16–17, 60). Without her knowledge, the debtor's brother tape-recorded a call during which she allegedly threatened the debtor with physical harm if he did not pay up (Pet. App. 16A). On September 13, 1973, agents of the Federal Bureau of Investigation, after giving respondent full *Miranda* warnings and observing her sign a waiver of rights form (*id.* at 16A–17A), questioned her about the call. They did not tell her that it had been recorded, and she denied making any threats (*id.* at 17A).

On June 10, 1974, respondent appeared pursuant to subpoena before a grand jury in the Eastern District of New York. She was not given the complete *Miranda* warnings to which individuals facing custodial

244-302—77——2

interrogation are entitled,[1] nor was she told that she was a "target" of the grand jury investigation and subject to indictment. The government attorney did, however, advise respondent of her Fifth Amendment privilege against self-incrimination and told her that she had a right to have counsel of her choice outside the grand jury room and to consult with him or her at any time.[2] She was also cautioned that perjury is a serious offense (A. 4), and before testifying she swore that her testimony would be truthful (A. 2).

[1] The government did not tell respondent either that she had an absolute right to remain silent before the grand jury or that counsel would be provided for her if she were unable to bear the expense herself.

[2] The relevant colloquy was as follows (A. 3–4):

"Q. Mrs. Kramer [a name respondent often used when making telephone calls in the course of her employment], I want to explain to you your various Constitutional rights that you have as a witness who appears before a Federal Grand Jury. I want to tell you that this is a Federal Grand Jury inquiring into the possibility of a violation of the Federal Criminal Law, and the first right you have is the right under the Fifth Amendment to refuse to answer any question that you feel might tend to incriminate you; do you understand what your rights are under the Fifth Amendment?

"A. Yes.

"Q. At any time you feel the questions I am asking may tend to incriminate you, you will not be obliged to answer those questions; do you understand that?

"A. Yes, I do.

"Q. And now, do you understand that the Fifth Amendment privileges against self-incrimination, that that privilege is extended to you and not to any information or to any other individual that might be incriminated; do you understand that right?

"A. Yes, I do.

"Q. Now, the next right you have under the Sixth Amendment, is the right to counsel; you can have a lawyer of your choice outside of the Grand Jury room to assist you with any questions that you may have a question with. You may have a question about

Government counsel then questioned respondent about her employer's business in general and the role she played in it (A. 7–18). Again she was not told about the recording. She denied unequivocally having made certain statements that the government attorney read to her from a transcript of the recorded conversation,[3] and the grand jury indicted her for

the procedures or any specific questions, that you may have an opportunity to leave the Grand Jury room and consult with your attorney; do you understand that right?

"A. Yes, I do.

"Q. Do you have an attorney with you today?

"A. No, I do not.

"Q. Now, do you feel the need of one?

"A. I do not.

"Q. And now, at any time you feel like stepping outside the Grand Jury room to call an attorney or consult with an attorney, you let us know and we'll give you that opportunity.

"A. Fine."

[3] The pertinent testimony was as follows (A. 23):

"Q. I'm going to read some direct quotes to you, Mrs. Jacobs, and I want to know whether or not you said them?

" 'Mrs. Kramer. Well, you know what's going to happen to him one of these days.

" 'Bill. Well, he's going to die [' he' refers to the debtor, who by then was known to be suffering from leukemia] and now that's besides the point.

" 'Mrs. Kramer. Sooner than he expects.

" 'Bill. No. I don't.

" 'Mrs. Kramer. Sooner than he expects. Maybe it's going to be painful to be honest with you.'

"A. I never said that.

"Q. Are you absolutely positive that you never said that?

"A. Absolutely positive.

"Q. Now, you're under oath——

"A. I never said that.

"Q. You never said to anyone these words, 'Maybe it's going to be painful, to be honest with you.'

"A. I never said it. I know I'm under oath.

perjury, in violation of 18 U.S.C. 1623 (A. 60–62).[4]

2. Before trial, respondent moved to suppress her grand jury testimony on the ground that the government's warnings to her had been inadequate. After an evidentiary hearing (A. 63–82), the district court granted the motion, relying on *United States* v. *Mandujano*, 496 F. 2d 1050 (C.A. 5), subsequently reversed, 425 U.S. 564, and *United States* v. *Washington*, 328 A. 2d 98 (C.A. D.C.), also subsequently reversed, No. 74–1106, decided May 23, 1977. The court ruled that the government's questioning of respondent, without first giving her full *Miranda*

"Q. Now, did you know the statute of perjury?

"A. Yes. I never said that.

"Q. We'll continue.

" 'BILL. Well, you know it's got nothing to do with me.

" 'MRS. KRAMER. I mean it's really a shame, but he's gonna get his pretty soon, just a matter of hours to be honest with you and as I told you, I'm being honest with you. We didn't like going to the mother, but we will.

" 'BILL. Well, you know.'

"Q. (continuing) Do you recognize those words?

"A. Not exactly.

"Q. You had some sort of conversation?

"A. By the way of saying I wish you could contact your brother.

"Q. Did you say, 'What he's going to get his pretty soon'?

"A. I did not.

"Q. You absolutely deny that statement?

"A. Yes. I deny it."

[4] Respondent was also indicted for transmitting in interstate commerce a threat to injure, in violation of 18 U.S.C. 875(c). That count is not involved here.

Respondent also appeared before the grand jury on November 4, 1974 (A. 27–59), at which time she was told she was a subject of the investigation (A. 28). The perjury charged related only to her testimony at her first appearance.

warnings and advising her that she was a "putative defendant," was "so 'offensive to the common and fundamental ideas of fairness' as to amount to a denial of due process" (Pet. App. 31A). Without her grand jury testimony the government would be unable to prosecute the perjury count, and the district court accordingly dismissed it (*id.* at 31A–32A).

The court of appeals affirmed, although for different reasons. It expressly declined to reach the constitutional issues that had been argued in the district court and on appeal (Pet. App. 19A) and ruled instead, "solely under [its] supervisory power" (*id.* at 22A), that suppression was necessary because the government's failure to give a "target" warning in this case departed from prevailing, circuit-wide prosecutorial practice and created what the court believed to be an intolerable lack of "uniformity in criminal procedure within the circuit" (*ibid.*).[5] In the court's view, the government's conduct in this case, "if not in actual violation of the Constitution, is, at least, outside the penumbra of fair play" (*id.* at 21A).

[5] Upon learning that the government attorney who had questioned respondent before the grand jury—a "Strike Force" attorney—had not told her that she was a "target" of the investigation, the court directed its clerk to poll the six United States Attorneys in the Second Circuit to learn their practice in this regard. Each replied that he customarily warns grand jury witnesses who are "putative defendants" of their status. This survey indicated to the court that respondent would have been warned that she was a "putative defendant" if she had been subpoenaed by the United States Attorney, yet "the Strike Force operating in the same district failed to give her such warning" (Pet. App. 21A).

3. This Court granted the government's petition for a writ of certiorari (No. 75–1883, 429 U.S. 909), vacated the judgment of the court of appeals, and remanded for reconsideration in light of the intervening decision in *United States* v. *Mandujano, supra* (holding that the Fifth Amendment privilege against compelled self-incrimination does not require the suppression, in a perjury prosecution, of allegedly perjurious grand jury testimony of a witness who was not given full *Miranda* warnings).

On remand, the court of appeals adhered to its decision. It said (Pet. App. 3A–4A) that it had anticipated (and that it agreed with) this Court's ruling in *Mandujano,* but that its own ruling had not been based on constitutional grounds but on its conception of its "duty to avoid uneven justice in the circuit, resulting from [the government's] mere negligence or inattention to established practice and guidelines" (*id.* at 6A). The court acknowledged (*ibid.*) that the government could equally well achieve uniformity by adopting a practice of never giving "target" warnings in any case. It held that, since "the policy of the various prosecutors should be uniform," and since "[i]t is an important function of the administration of criminal justice to let our citizens know that equal justice is available to all" (*ibid.*), the "sanction of suppression is salutary in the circumstances" (*id.* at 8A). The court further explained that it was imposing that sanction for a "didactic purpose" (*id.* at 13A), and to prevent "chaos in criminal law administration through the presence in the same district of a two-

headed prosecution branch operating on conflicting procedures" (*id.* at 12A). The sanction was especially appropriate, in the court's view (*id.* at 7A), because respondent remained subject to prosecution for the substantive offense (see note 4, *supra*); in these circumstances the government "was [not] entitled to the luxury of a perjury count" (*id.* at 7A).

In addition, the court of appeals rejected the government's arguments that its exercise of supervisory powers to suppress respondent's testimony was barred by both 18 U.S.C. 3501(a), which provides that voluntary confessions "shall be admissible," and by Rule 402 of the Federal Rules of Evidence, which provides that "[a]ll relevant evidence is admissible" except when exclusion is required by the Constitution, a federal statute, or a rule promulgated by this Court pursuant to statutory authority. It ruled that respondent's denials in the grand jury were not "self-incriminating" statements for purposes of Section 3501 (a) (Pet. App 11A) and that the Federal Rules of Evidence are not "concern[ed] * * * with the supervisory powers of the federal courts" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

In *McNabb* v. *United States,* 318 U.S. 332, this Court first explicitly announced and asserted the judiciary's "supervisory" power over the administration of justice in the federal courts. There it was suggested that the power derived from the Court's authority to formulate common law rules of evidence for use

in federal criminal trials (*id.* at 341),[6] an authority that was firmly established in *Funk* v. *United States*, 290 U.S. 371, and sanctioned by Congress in former Rule 26 of the Federal Rules of Criminal Procedure.[7] In many cases the Court's use of the "supervisory" power has been so limited.[8]

In other cases, however, the supervisory power has assumed a broader role. The Court has invoked it, for example, to enjoin a federal officer from testifying at a state criminal trial about evidence he seized unlawfully (*Rea* v. *United States*, 350 U.S. 214); to require an administrative agency to reopen proceedings to consider whether the testimony of certain witnesses had been perjured (*Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115); and to reverse a defendant's convictions on several counts where the circumstances, which included "one judge's clearly expressed intention to impose a five-year sentence" and "another judge's imposition of

[6] See also *United States* v. *Mitchell*, 322 U.S. 65, 66 ("Practically the whole body of the law of evidence governing criminal trials in the federal courts has been judge-made. * * * The *McNabb* decision was merely another expression of this historic tradition, whereby rules of evidence for criminal trials in the federal courts are made a part of living law and not treated as a mere collection of wooden rules in a game."); Note, *Evidence—Confessions—Voluntary Confessions of Defendants While in Illegal Custody Held Inadmissible*, 56 Harv. L. Rev. 1008, 1009 (1943).

[7] See 2 Wright, *Federal Practice and Procedure* § 401, pp. 60–62 (1969).

[8] See, *e.g.*, *Elkins* v. *United States*, 364 U.S. 206; *Jencks* v. *United States*, 353 U.S. 657, 668; *Grunewald* v. *United States*, 353 U.S. 391; *Gordon* v. *United States*, 344 U.S. 414; *Upshaw* v. *United States*, 335 U.S. 410.

a twenty-year sentence," were not "consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts" (*Saldana* v. *United States*, 365 U.S. 646, 647).[9]

Whatever the ultimate source and precise scope of the judicial supervisory power,[10] this Court's decisions clearly establish two limitations on its exercise. First,

[9] In addition, the Court has used the supervisory power to consider, in passing on a claim of insufficiency of evidence, a transcript not officially part of the record (*Mortensen* v. *United States*, 322 U.S. 369); to reverse judgments without inquiring into actual prejudice to the parties where daily wage earners (*Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 225) or women (*Ballard* v. *United States*, 329 U.S. 187, 192–193) were systematically excluded from jury lists; to order a new trial where the government questioned the credibility of one of its witnesses (*Mesarosh* v. *United States*, 352 U.S. 1; cf. *United States* v. *Shotwell Manufacturing Co.*, 355 U.S. 233); to reverse a contempt conviction and to remand for further proceedings before a different district court judge (*Offutt* v. *United States*, 348 U.S. 11, 13); and to reverse a conviction where jurors had seen prejudicial newspaper accounts of the defendant's past criminal conduct (*Marshall* v. *United States*, 360 U.S. 310, 313).

[10] See generally Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963). By and large, the supervisory power has been recognized and exercised in the context of review of events occurring in or directly affecting the trial or administrative proceeding under review in the appellate court. See Note, *The Judge-Made Supervisory Power of the Federal Courts*, 53 Geo. L. Rev. 1050, 1056 (1965). The *McNabb-Mallory* line of cases and *Rea* are the only ones we know of in which the supervision was directed at conduct of government officials outside the trial context, with a judicial remedy being forged in response to official violations of constitutional or statutory rights. The court of appeals in the present case, however, has asserted the power to supervise conduct of executive officials that neither occurred within the confines of respondent's trial nor violated any of her constitutional or statutory rights.

244-302—77——8

the supervisory power is subordinate to the paramount authority of Congress to declare, within constitutional limitations, what practices and procedures will govern trials in the federal courts. This limitation was adverted to in *McNabb* (318 U.S. at 341, n. 6) and expressly declared in *Palermo* v. *United States*, 360 U.S. 343, 353, n. 11: "The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress."[11]

Second, even when not precluded by an Act of Congress, the courts' use of supervisory powers to exclude material evidence must be "sparingly exercised," and then only when "overriding considerations" justify it. *Lopez* v. *United States*, 373 U.S. 427, 440. "[A]ny apparent limitation upon the process of discovering truth in a federal trial ought to be imposed only upon the basis of considerations which outweigh the general need for untrammeled disclosure of competent and relevant evidence in a court of justice." *Elkins* v. *United States*, 364 U.S. 206, 216.

The court below disregarded both of these limitations. We show in Part I, *infra*, that two Acts of Congress—Rule 402 of the Federal Rules of Evidence and 18 U.S.C. 3501—prohibited the court's exercise

[11] Accord, *Gordon* v. *United States*, *supra*, 344 U.S. at 418; *Upshaw* v. *United States*, *supra*, 335 U.S. at 414–415 (dissent); *Wolfle* v. *United States*, 291 U.S. 7, 13; *Funk* v. *United States*, *supra*, 290 U.S. at 374–375, 379, 382.

of any supervisory power it might otherwise have to suppress respondent's relevant and voluntary self-incriminating testimony. Then in Part II, *infra*, we show that, even assuming that those two Acts are not controlling here, the court abused its discretion in invoking its supervisory power to exclude respondent's grand jury testimony.

There was "no manifestly improper conduct by federal officials" (*Lopez* v. *United States*, *supra*, 373 U.S. at 440) in this case, and suppression of respondent's allegedly perjurious testimony would have been an inappropriate remedy even if the warnings procedure followed by the government had violated her constitutional privilege against self-incrimination (*United States* v. *Wong*, No. 74–635, decided May 23, 1977; *United States* v. *Mandujano*, 425 U.S. 564). The court acknowledged that the lack of uniformity occasioned by the Strike Force attorney's failure to give respondent a "target" warning violated none of respondent's rights, and in these circumstances the court's use of supervisory power in effect to immunize her from trial on criminal charges was improper. Moreover, the court's decision to punish the government because one of its attorneys, unwittingly and without bad faith, violated a practice of the United States Attorney's office will be more likely to discourage prosecutors from voluntarily adopting policies that confer benefits on suspects or defendants in criminal cases than it will be to enforce uniform prosecutorial practices.

ARGUMENT

I

THE COURT OF APPEALS HAD NO SUPERVISORY POWER TO SUPPRESS RESPONDENT'S GRAND JURY TESTIMONY

A. EXCLUSION OF RESPONDENT'S GRAND JURY TESTIMONY WAS CONTRARY TO RULE 402 OF THE FEDERAL RULES OF EVIDENCE

Rule 402 of the Federal Rules of Evidence provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Respondent's grand jury testimony was relevant to both the charge of perjury and the charge of transmitting a threat in interstate commerce. The court of appeals did not rule that the Constitution, any Act of Congress, any other Rule of Evidence, or any rule promulgated by this Court pursuant to statutory authority required the exclusion of that testimony. Her testimony therefore was admissible, and in our view the court of appeals had no power to suppress it.

The court's contrary ruling was based on its erroneous belief that the enactment of the Federal Rules of Evidence had no impact on the judiciary's supervisory powers (Pet. App. 11A). Prior to the

enactment of those Rules,[12] questions of admissibility of evidence in criminal trials in the federal courts were governed by Congress' codification, in former Rule 26 of the Federal Rules of Criminal Procedure, of this Court's decision in *Funk* v. *United States*, 290 U.S. 371." That Rule provided:

> * * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

To the extent that the federal courts' supervisory power has been equated to the power to declare common law rules of evidence (*e.g., Elkins* v. *United States, supra*, 364 U.S. at 216)—a power that "exists only in the absence of a relevant Act of Congress" (*Palermo* v. *United States, supra*, 360 U.S. at 353, n. 11)—the new federal rules abrogated it entirely. The purpose of the legislation was "to provide a uniform code of evidence for use in Federal courts, and to

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[12] The Rules were initially promulgated by this Court pursuant to its rulemaking power under the Rules Enabling Acts (18 U.S.C. 3771, 3772, 3402; 28 U.S.C. 2072, 2075). They were enacted into law as an Act of Congress (Pub. L. 93-595, 88 Stat. 1926) and became effective on July 1, 1975. For a review of the background of the Rules, see Wright and Graham, *Federal Practice and Procedure; Evidence* §§ 5001-5007, pp. 1-113 (1977).

[13] See the Advisory Committee Note to former Rule 26, 8A Moore's *Federal Practice* ¶26.01[2] (1976).

make conforming amendments to * * * the Federal Rules of Criminal Procedure." H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 1 (1973). One of those conforming amendments was the deletion of the above-quoted sentence from Rule 26. In short, with the pasage of the Rules of Evidence, the federal courts' supervisory power to elucidate the common law of evidence "in the light of reason and experience" came to an end.

It is true that the scope of the judiciary's supervisory power has not been strictly limited to formulating common law rules of evidence (see pp. 10-11 and n. 9, *supra*). Contrary to the court of appeals' implicit conclusion, however, it does not follow that, unless Congress clearly manifests an intent to restrict or nullify particular judicial supervisory powers, any statute that it passes to govern practice in the federal courts can be disregarded in favor of an inconsistent exercise of such powers.

Congress chose the language of Rule 402 with care: relevant evidence is to be excluded solely in those cases where exclusion is mandated "by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court *pursuant to statutory authority*" (emphasis added).[14] Having strictly limited this Court's ability to fashion

[14] The language "pursuant to statutory authority" did not appear in Rule 402 when it was first submitted to Congress. It was added to make it clear that Congress henceforth considered itself the sole source of authority for the promulgation or amendment of uniform rules of evidence for the federal courts. See H.R. Rep. No. 93-650, *supra*, at 7.

rules excluding otherwise relevant evidence, Congress plainly could not have intended to allow the courts of appeals an unfettered "supervisory power" to exclude evidence that the statute declares is admissible.[15]

B. RESPONDENT'S GRAND JURY TESTIMONY WAS A "SELF-INCRIMINATING STATEMENT" AND WAS THEREFORE ADMISSIBLE UNDER 18 U.S.C. 3501

Section 3501(a) of Title 18 provides that in any criminal prosecution in the federal courts a confession, which is defined to include "any self-incriminating statement" (Section 3501(e)), "*shall* be admissible in evidence if it is voluntarily given" (emphasis added). Congress passed that statute as part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, principally in order to counteract what it perceived to be the deleterious impact on

[15] A colloquy between Congressmen Smith and Hutchinson during the floor debates on the Rules clearly makes the point (120 Cong. Rec. 1413-1414 (1974)):

"Mr. HUTCHINSON. But so far as the codification itself is concerned it would not be possible legally for a judge in any court to provide a rule of evidence at variance with this modification. So far as the codification reaches, it will be uniform throughout the country.

"Mr. SMITH of New York. I would say to the gentleman that is correct. In many of the rules that we have proposed, the judges have a certain amount of discretion as to whether to allow evidence in or out depending upon the cases as outlined in the codified rule.

"It would be my answer that a judge would not be able to hold adversely to the codified rules of evidence and that the only way those could be changed would be through further legislation. In the event that some rule turns out in practice to be one that reasonable people would agree ought to be changed, it would be subject to further legislation for amendment."

law enforcement of this Court's exclusion of confessions in *McNabb* v. *United States*, 318 U.S. 332, *Mallory* v. *United States*, 354 U.S. 449, and *Miranda* v. *Arizona*, 384 U.S. 436. See S. Rep. No. 1097, 90th Cong., 2d Sess. 37–51 (1968);[16] *United States* v. *Marrero*, 450 F. 2d 373 (C.A. 2); *United States* v. *Halbert*, 436 F. 2d 1226 (C.A. 9). Noting that "[v]oluntary confessions have been admissible in evidence since the early days of our Republic" and that "[t]hese inculpatory statements have long been recognized as strong and convincing evidence—often called the best evidence of guilt" (S. Rep. No. 1097, *supra*, at 38), Congress intended Section 3501 to assure "[t]he traditional right of the people to have their prosecuting attorneys place in evidence before juries the voluntary confessions and incriminating statements made by defendants * * *" (*id.* at 37).

The court of appeals ruled that Section 3501 is inapplicable to this case because, in its view (Pet. App. 10A–11A), respondent's allegedly perjurious denial of the threatening telephone call was neither a "confession" nor a "self-incriminating statement." We concede that respondent's testimony was not a confession in the commonly understood sense of an advertent, public declaration to the authorities by the accused of his or her own wrongdoing. The expression "self-in-

[16] Since *McNabb* was decided by the Court in the exercise of its supervisory powers (see 318 U.S. at 341–342), Congress was confident of its authority to override that decision. See S. Rep. No. 1097, *supra*, at 40. Congress was less certain of its ability to override *Miranda*. See *id.* at 46–47, 50–51.

criminating statement," however, has a far broader meaning than a "confession."[17] For example, in contrast to confessions, "self-incriminating statements" are not limited to those that the speaker recognizes to be incriminating at the time they are made. Respondent's false denials were in our view plainly "incriminatory," and they do not escape the reach of Section 3501 simply because they also happened to constitute the *corpus delicti* of her alleged perjury. Indeed, it is difficult to conceive of a statement more self-incriminating than a lie told under oath to an official who knows the truth of the matter.

The broad construction of "self-incriminating statement" that we urge is in keeping with Congress' intent in enacting Section 3501. As we noted above, that statute was passed in response to this Court's decision in *Miranda* v. *Arizona*, *supra*, which held that, absent effective warnings regarding the Fifth Amendment privilege against compelled self-incrimination, any statements made by an accused during custodial interrogation would be inadmissible at trial. The Court there refused to draw any distinction "between inculpatory statements and statements alleged to be merely 'exculpatory'" (384 U.S. at 477), for it was of the view that relevant statements made by the

[17] Webster's *Third New International Dictionary* (1961) defines "self-incrimination" to mean "the giving of evidence or answering questions the tendency of which would be to subject one to a criminal prosecution."

accused that the government would use to discharge its burden of proving guilt "are incriminating in any meaningful sense of the word" (*ibid.*). Congress' use of the term "self-incriminating" in Section 3501 should be given a meaning as broad as the term was given in *Miranda;* there is no reason why a statement should be considered "self-incriminating" for purposes of *Miranda's* exclusionary rule but not "self-incriminating" for purposes of Section 3501's rule of admissibility.[18]

The Third Circuit has recognized that the courts have no supervisory power to suppress voluntary confessions in light of Section 3501. In *United States* v. *Crook,* 502 F. 2d 1378 (C.A. 3), certiorari denied, 419 U.S. 1123, the court held that a defendant's voluntary waiver of counsel prior to questioning by federal agents who knew he was represented by counsel on pending, unrelated charges did not contravene *Massiah* v. *United States,* 377 U.S. 201. The court then

[18] Respondent's denials of guilt not only were perjurious but also were evidence of her guilt on the charge against her of transmitting in interstate commerce a threat to injure (see note 4, *supra*), since false exculpatory statements are circumstantial evidence of guilty consciousness. See, *e.g.*, *United States* v. *Kahan*, 415 U.S. 239; *Wilson* v. *United States*, 162 U.S. 613, 620–621; *United States* v. *Parness*, 503 F. 2d 430, 438 (C.A. 2), certiorari denied, 419 U.S. 1105; *United States* v. *Merrill*, 484 F. 2d 168, 170 (C.A. 8), certiorari denied, 414 U.S. 1077; *United States* v. *Tager*, 481 F. 2d 97, 100 (C.A. 10), certiorari denied, 415 U.S. 914; *United States* v. *Lompres*, 472 F. 2d 860, 863 (C.A. 7), certiorari denied, 411 U.S. 965. At the very least, then, the court of appeals erred in ordering respondent's grand jury testimony suppressed as to this count.

considered and rejected the possibility of exercising supervisory powers to create a rule adopting the prohibition contained in the American Bar Association's Code of Professional Responsibility[19] against interrogation of a defendant in the absence of his or her counsel. The court noted (502 F.2d at 1380) that the Code provisions were enforceable "only under our supervisory powers," which are "subject to the control of Congress." Since Congress had decreed that voluntary confessions shall be admitted, the court recognized its lack of authority to formulate a conflicting evidentiary rule. "We cannot," said the court (*id.* at 1381), "in exercising merely supervisory powers, disregard the congressional mandate of 18 U.S.C. § 3501(a)."

The court below attempted to distinguish *Crook* on the asserted ground that the Third Circuit's holding that the defendant's constitutional rights had not been violated made the subsequent discussion of Section 3501 and its limitation on the exercise of judicial supervisory power mere dictum (Pet. App. 11A–12A). But the court's description of *Crook* only highlights its resemblance to this case, where the court also found that respondent's statements were secured without violation of any of her constitutional rights. The court below further attempted to distinguish *Crook* as involving "a real 'confession'" (*id.* at 12A), but, as we have shown, the distinction between inculpatory

[19] D.R. 7-104(A)(1) (Final Draft, July 1, 1969).

and facially exculpatory incriminating statements is not material for purposes of Section 3501.

The Third Circuit followed *Crook* in *United States* v. *DiGilio,* 538 F. 2d 972 (C.A. 3), certiorari denied, 429 U.S. 1038. There the court ruled (538 F. 2d at 985) that the government had misused grand jury subpoenas to facilitate investigatory interrogation of defendants outside the grand jury's presence; nevertheless, it held that under Section 3501 it "lacked any supervisory authority to suppress" the defendant's statements unless they were given involuntarily. The court below sought to distinguish *DiGilio* on the sole ground (Pet. App. 12A, n. 12) that it "involved no question whether defendants are treated differently by the Strike Force than the normal practice would require." We fail to see how this factual difference between the two cases can make Section 3501 applicable to one but not the other.[20] Absent a determination that respondent's grand jury testimony was not voluntarily

[20] See also *United States* v. *Anderson,* 352 F. Supp. 33, 37, n. 10 (D.D.C.), affirmed, 490 F. 2d 785 (C.A. D.C.), in which the district court ruled that, where no constitutional violation had tainted a lineup procedure, 18 U.S.C. 3502 precluded the use of the court's supervisory power to exclude identification testimony by an eyewitness to the crime. That statute, which, like Section 3501, was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, provides:

"The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried *shall be admissible* in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States." [Emphasis added.]

given, Section 3501 governs, and the court below had no power—supervisory or otherwise—to suppress it."[21]

II

IF THE COURT OF APPEALS HAS SUPERVISORY POWER TO SUPPRESS EVIDENCE SUCH AS RESPONDENT'S TESTIMONY, IT ABUSED ITS DISCRETION IN EXERCISING IT IN THIS CASE

1. If, contrary to the foregoing arguments, Rule 402 and Section 3501 do not preclude the exercise by the court of appeals of any supervisory power it may previously have possessed to suppress respondent's grand jury testimony in this case, then the propriety of the court's exercise of that power must be tested according to the standards enunciated in *Lopez* v. *United States,* 373 U.S. 427 (decided prior to enactment of both statutes discussed above). There

[21] The court of appeals noted (Pet. App. 11A) that Section 3501(b) instructs the district court in determining voluntariness to consider all of the circumstances surrounding the giving of any statement by the defendant, including whether the defendant at the time "knew the nature of the offense with which he was charged or * * * suspected." The court then said (*ibid.*): "There is no evidence that Mrs. Jacobs had such knowledge." We take this remark to be something other than a ruling by the court that respondent's allegedly perjurious denial was involuntary. Whether she knew the nature of the offenses of which she was suspected, and what effect the state of her knowledge may have had on the voluntariness of her grand jury testimony, were factual issues that were not raised before or passed upon by the district court and that the court of appeals presumably was not attempting to resolve in the first instance.

the Court refused to suppress lawfully obtained recordings of a defendant's face-to-face conversations with an Internal Revenue Service agent whom he had attempted to bribe. The Court observed that a court's supervisory power "to refuse to receive material evidence is a power that must be sparingly exercised" (*id.* at 440). In that case—as in this one—there was "no manifestly improper conduct by federal officials," and the Court ruled that the exercise of its supervisory powers to suppress the recordings "would be wholly unwarranted" (*ibid.*). The Court continued (*ibid.*):

> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

See also *United States* v. *Nixon,* 418 U.S. 683, 709; *Elkins* v. *United States, supra,* 364 U.S. at 216; *id.* at 234 (Franfurter, *J.,* dissenting); *Funk* v. *United States, supra,* 290 U.S. at 381; *United States* v. *Grimes,* 438 F. 2d 395 (C.A. 6), certiorari denied, 402 U.S. 989; *United States* v. *Jones,* 433 F. 2d 1176, 1181–1182 (C.A.D.C.), certiorari denied, 402 U.S. 950; *United States* v. *Quarles,* 387 F. 2d 551, 555–556 (C.A. 4), certiorari denied, 391 U.S. 922.

To the cautionary principles of *Lopez* must be added this Court's decisions in *United State* v. *Mandujano,* 425 U.S. 564, and *United States* v. *Wong,* No. 74–635, decided May 23, 1977. These cases established that, whatever warnings regarding the constitutional privilege against self-incrimination might be required to be given to "putative defendants" in general, the absence of warnings is immaterial in a perjury prosecution because " '[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them' " (*United States* v. *Mandujano, supra,* plurality opinion, 425 U.S. at 577; concurring opinion of Mr. Justice Brennan, *id.* at 585; concurring opinion of Mr. Justice Stewart, *id.* at 609; quoting from *Bryson* v. *United States,* 396 U.S. 64, 72). If a possible violation of a grand jury witness' constitutional rights is insufficient to justify suppression of allegedly perjurious testimony, it would seem especially difficult to justify the use of supervisory powers to impose the same sanction where none of the witness' rights has been violated. In acting as it did, the court below has overridden both the principles of *Lopez* and the policies that sustained the perjury prosecutions in *Bryson, Mandujano,* and *Wong.* Cf. *Lego* v. *Twomey,* 404 U.S. 477, 488, n. 16.

The court erroneously believed that its result was justified by the lack of uniformity in prosecutorial practice created by the Strike Force attorney's failure to advise respondent of her status as a potential de-

fendant."[22] The court did not rule that any of respondent's rights had been violated (Pet. App. 4A), and it acknowledged that the government could legitimately achieve uniformity by adopting a practice of never giving "target" warnings in any case (*id.* at 3A, 6A, 14A). It believed that suppression was nevertheless appropriate "to let our citizens know that equal justice is available to all" (*id.* at 6A).

We do not question the value of consistency in prosecutorial decisionmaking. But nonuniformity in prosecutorial practice—provided it offends no statutory or constitutional proscription—has never, to our knowledge, been considered a sufficient cause to terminate a prosecution. The Executive Branch has broad discretion to carry out its constitutional mandate to "take Care that the Laws be faithfully executed." United States Constitution, Article II, Section 3. See *United States* v. *Nixon*, 418 U.S. 683, 693; *United States* v. *Cox*, 342 F. 2d 167, 171 (C.A. 5), certiorari denied, 381 U.S. 935; see generally *Nixon* v. *Administrator of General Services*, No. 75–1605, decided June 28, 1977, slip op. 13–15. This discretion, which, "ordinarily at least, is not subject to judicial review" (*Weisberg* v. *Departmnt of Justice*, 489 F. 2d 1195, 1201 (C.A. D.C.) (*en banc*), certiorari denied, 416 U.S. 993), embraces such vital matters as plea bar-

[22] It is now settled that the Constitution does not require that "target" warnings be given to potential defendants called to testify before the grand jury. *United States* v. *Washington*, No. 74–1106, decided May 23, 1977.

gaining, sentencing recommendations, grants of testimonial immunity, and even the selective enforcement of criminal laws, so long as the prosecutor's decisionmaking is not based upon impermissible considerations "such as race, religion, or other arbitrary classification." *Oyler* v. *Boles*, 368 U.S. 448, 456. While *Oyler* was a state case, and the Court thus was not addressing itself to the issue in the context of supervisory power, the principles it enunciated have been consistently applied in federal cases as well. See, *e.g.*, *City of Milwaukee* v. *Saxbe*, 546 F. 2d 693, 706 (C.A. 7); *United States* v. *Jones*, 527 F. 2d 817, 820 (C.A.D.C.); *United States* v. *Cowan*, 524 F. 2d 504, 507–509 (C.A. 5), certiorari denied, 425 U.S. 971; *United States* v. *Mann*, 517 F. 2d 259, 271 (C.A. 5), certiorari denied, 423 U.S. 1087; *United States* v. *Swanson*, 509 F. 2d 1205, 1208 (C.A. 8); *United States* v. *Raven*, 500 F. 2d 728, 733, n. 14 (C.A. 5), certiorari denied, 419 U.S. 1124; *United States* v. *Brown*, 481 F. 2d 1035, 1042–1043 (C.A. 8); *United States* v. *Jones*, 438 F. 2d 461, 467–468 (C.A. 7).

In *Newman* v. *United States*, 382 F. 2d 479, 481–482 (C.A. D.C.), Chief Justice (then Judge) Burger stated the position we urge:

> An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, *i.e.*, his demeanor, deportment and ethical conduct; but

> in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment. * * *
>
> To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task; of course this concept would negate discretion. * * *
>
> It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths; and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.

"Target" warnings are not constitutionally (or statutorily) required (*United States* v. *Washington, supra*), and therefore the determination whether or not to give them falls within the discretionary prosecutorial function. There is no suggestion here that the Strike Force Attorney's decision not to warn respondent of her status as a potential defendant resulted from discriminatory or otherwise impermissible motives, nor even that he was aware that his actions were contrary to any policy of the United States Attorney. There has been "no manifestly improper conduct by federal officials" (*Lopez* v. *United States, supra,* 373 U.S. at 440) in this case, and none of

respondent's rights has been abridged. Yet the court of appeals in effect has pardoned petitioner,[22] acting out of an abstract interest in uniformity of prosecutorial performance and in plain disregard of this Court's twice-repeated caution (given in the context of entrapment cases but no less relevant here) that the federal judiciary does not sit to exercise "'a 'chancellor's foot' veto over law enforcement practices of which it d[oes] not approve." *Hampton* v. *United States,* 425 U.S. 484, 490 (plurality opinion), quoting from *United States* v. *Russell,* 411 U.S. 423, 435.[23]

2. It makes no difference that the lack of uniformity here was caused by the Strike Force Attorney's failure to follow a general policy already in existence.

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[22] The court of appeals' attempt to support its ruling that the government in this case is not "entitled to the luxury of a perjury count" (Pet. App. 7A) by pointing out that respondent remains subject to prosecution for transmitting a threat in interstate commerce (*ibid.; id.* at 14A) is in our view unavailing. The respondent may have committed and may be convicted and punished for another crime does not mean that the court of appeals has avoided "allowing a possibly guilty person to escape" (*id.* at 6A–7A) punishment for the crime of perjury. In *United States* v. *Mandujano, supra*, the pendency of charges for crimes other than perjury was irrelevant (see 425 U.S. at 569, n. 2); it should have been equally irrelevant here.

[23] Cf. *United States* v. *Lovasco*, No. 75–1844, decided June 9, 1977, slip op. 7 ("Judges are not free, in defining 'due process,' to impose on law enforcement officials our 'personal and private notions of fairness and to 'disregard the limits that bind judges in their judicial function.' *Rochin* v. *California* [, 342 U.S. 165, 173]"); *McNabb* v. *United States*, *supra*, 318 U.S. at 347; *Rea* v. *United States*, 350 U.S. 214, 218 (Harlan, *J.*, dissenting).

The nonobservance of a discernible standard that is intended to govern prosecutorial decisionmaking at any of the numerous stages of the criminal process where discretion must be exercised does not, in our view, warrant dismissal of a prosecution if none of the defendant's rights have been violated. See *Sullivan* v. *United States*, 348 U.S. 170, 173–174.

United States v. *Leahey*, 434 F. 2d 7 (C.A. 1), and *United States* v. *Heffner*, 420 F. 2d 809 (C.A. 4), cited by the court of appeals in support of its result (Pet. App. 5A–6A), were in our view wrongly decided, for the reasons suggested by Judge Friendly in another decision of the Second Circuit not cited by the court below. See *United States* v. *Leonard*, 524 F. 2d 1076, 1089, certiorari denied, 425 U.S. 958.[25] It is unnecessary, however, for the Court in this case to pass upon the correctness of *Leahey* and *Heffner*, for they are distinguishable. Those decisions overturned convictions because the government had introduced into evidence self-incriminating statements made by the defendants during noncustodial interviews with Internal Revenue Service Agents who, contrary to a generally available statement of policy published by the IRS, had failed to precede the interview with *Miranda* warnings. In the present case, by contrast, the informal practice of giving "target"

[25] *Leahey* and *Heffner* were followed in *United States* v. *Sourapas*, 515 F. 2d 295 (C.A. 9), and *United States* v. *Caceres*, 545 F. 2d 1182 (C.A. 9), pending on petition for a writ of certiorari (No. 76-1309). In our petition in *Caceres* we have outlined our reasons for believing this line of decisions to be incorrect.

warnings was neither published nor generally available; indeed, it was discernible to the court of appeals only upon a poll by the court of all of the United States Attorneys in the circuit, each of whom was free under Department of Justice policy to adopt such practice in this regard (including a practice of proceeding on a case-by-case basis) as he wished.[26] Thus, even assuming that *Leahey* and *Heffner* correctly state the law, those decisions are not authority for holding the government to an informal practice that exists only by virtue of its coincidental adoption by six United States Attorneys.[27]

[26] The "guidelines" to which the court of appeals referred (Pet. App. 5A) are those promulgated by the Attorney General to govern the relationship between Strike Force attorneys (who operate under a commission from the Attorney General pursuant to 28 U.S.C. 515(a)) and the United States Attorneys. Those guidelines provide generally that in grand jury proceedings the former "shall * * * operate under the direction of" the latter. See Office of the Attorney General, Order No. 431–70 (reprinted in *In re Subpoena of Persico*, 522 F. 2d 41, 68–71 (C.A. 2)). The guidelines do not require (or even mention) "target" warnings. Indeed, while the Department of Justice is considering a revision of the United States Attorneys Manual to require that "target" warnings be given as a matter of course, there is no currently governing Department policy regarding such warnings, and although in most cases most United States Attorneys apparently give them, the practice appears to vary among and sometimes even within United States Attorneys' offices.

[27] *Leahey* is also distinguishable from the present case because it was based on a finding that the defendant's due process rights had been violated by the interrogation (see 434 F. 2d at 10–11), whereas the court below specifically disavowed any constitutional basis for its decision. Moreover, *Leahey* and like decisions did not involve prosecutions for perjury.

3. The other cases relied upon by the court of appeals also do not support its result. Indeed, *United States* v. *D'Angiolillo*, 340 F. 2d 453 (C.A. 2), certiorari denied, 380 U.S. 955, favors our position. There, flagrantly unlawful searches were made by federal agents, but no evidence seized during those searches was introduced at trial. The court, recognizing that in the absence of a violation of any of the defendant's rights at trial the matter was principally one for the Executive Branch, refused to exercise its supervisory power to dismiss the indictment and instead directed the United States Attorney to bring the unlawful searches to the attention of the superiors of the agents involved (*id.* at 456). In *United States* v. *Toscanino*, 500 F. 2d 267, 276 (C.A. 2), the court, refusing to follow *Frisbie* v. *Collins*, 342 U.S. 519, stated that it could, in the exercise of supervisory powers, direct the district court to refuse to accept jurisdiction over a defendant if it were shown that his presence was secured by patently illegal conduct by federal agents. In *United States* v. *Estepa*, 471 F. 2d 1132, 1136 (C.A. 2), the court exercised its supervisory powers to reverse a conviction and order an indictment dismissed because the United States Attorney had failed to heed numerous admonitions from the court regarding the unnecessary reliance on hearsay evidence before the grand jury and the desirability of apprising the grand jury of the hearsay nature of the evidence presented.

Without debating the propriety of the claim of supervisory power in *Toscanino* or its exercise in *Estepa*,[28] it is enough to say that in the present case the government neither broke the law nor disregarded repeatedly announced judicial preferences.[29]

[28] We disagree with the court of appeals that in this case it "did not go as far as [it] did in" *Estepa*. The government was free to reindict the defendants in *Estepa* upon presentation of direct evidence to the grand jury. See 471 F. 2d at 1137. Here respondent escapes prosecution for perjury.

[29] The *Allen* charge cases cited by the court below (Pet. App. 10A) represent exercises by the courts of appeals of supervisory control over matters of judicial administration. See, *e.g.*, *United States* v. *Thomas*, 449 F.2d 1177, 1186–1187 (C.A. D.C.) ("We have predicated our decision on the needs of judicial administration * * *."). The traditionally broad supervisory powers of the courts of appeals over the conduct of the district courts (see *Cupp* v. *Naughten*, 414 U.S. 141, 146; *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 259–260)—powers that we do not challenge—are largely irrelevant to the question whether and under what circumstances the courts of appeals possess and should exercise like powers over conduct of the Executive Branch occurring outside the context of a trial.

United States v. *Dooling*, 406 F. 2d 192 (C.A. 2), also cited by the court below (Pet. App. 10A), is another example of court of appeals control over the district court. That case, rather than supporting the disruption of criminal prosecutions through the exercise of broad and vaguely defined supervisory powers over prosecutorial conduct, reflects the limited nature of the judicial power to interfere with criminal prosecutions. There the court of appeals by mandamus directed the district court not to enter an order dismissing an indictment after the jury had returned a verdict of guilty. The court noted that the proposed dismissal was not based upon any power conferred upon the district court by the Federal Rules of Criminal Procedure (406 F. 2d at 196) or upon a finding by the district court that any of the defendants' rights had been violated, but rather upon the district court's "vague and unsubstantiated doubts" about the fairness of the trial (*id.* at 197). In these circumstances the court of appeals ruled that the proposed dismissal "would interfere seriously with the proper prosecution of criminal cases in the federal courts" (*id.* at 198) and exercised its supervisory power to prevent "gross disruption in the

However abstractly meritorious the court of appeals' goal of "bring[ing] the Strike Force and the United States Attorney to closer harmony" (Pet. App. 14A), it did not justify the court's use of its supervisory power to place respondent beyond the reach of prosecution for perjury simply because of an isolated departure from an informal prosecutorial practice not required by the Constitution, statute, or rule.

4. The premise of the court of appeals' use of the "didactic" sanction of suppression was that it would foster uniformity of prosecutorial practice. In our view, however, the court's decision will tend less to encourage uniform prosecutorial practice than to discourage adoption by the Executive Branch of formal policies or informal practices conferring upon suspects or defendants benefits not required by the Constitution or statute.[30] Occa-

administration of criminal justice" (*ibid.*). In the present case, by contrast, the court of appeals itself has "interfere[d] seriously with the proper prosecution" of a criminal case.

[30] There are many examples of such voluntarily adopted practices, some meant to be of uniform application, others meant to be effected on a case-by-case basis: interrogations of subjects of criminal tax investigations are preceded by advice of the nature of the inquiry and by administration of modified *Miranda* warnings, even though the questioning is noncustodial; except in special cases, individuals tried for state offenses are not subjected to federal prosecution for offenses arising from the same transaction, although there would be no double jeopardy bar to such prosecutions; defense attorneys in criminal cases are often permitted access to prosecutorial files, although there may be no constitutional or statutory obligation to disclose the materials, and are supplied with Jencks Act material in advance of the time disclosure is required by statute; and grand jury witnesses are given

sional departures from such policies and practices are virtually inevitable, given the number of prosecutors employed by the government and the volume and complexity of criminal litigation it is their duty to conduct. The remedy for such departures is in our view a matter for the Executive Branch. When the judiciary imposes sanctions that the executive believes to be excessively harsh—as in this case—then the result must be to prompt a reevaluation of the benefits and costs that attach to the policy in question. We do not suggest that the decision below will result in wholesale repudiation of policies favorable to suspects that have heretofore been voluntarily adopted by the government, but it will tend in some degree to encourage *ad hoc* prosecutorial practices rather than implementation of otherwise desirable across-the-board policies.

Moreover, the court of appeals' expansive view of its power to control what we consider to be discretionary prosecutorial conduct may add significantly to the burdens of the judiciary. Each of the many federal prosecutors is constantly called upon to make discretionary decisions in the discharge of his or her responsibilities. Charges of nonuniform practice will be relatively easy to make, and, if they are cognizable,

advice of rights or "target" warnings even though such warnings are not compulsory.

Comparable practices exist in the civil context. For example, prisoners facing possible transfer to another institution may be afforded an opportunity for a hearing that due process does not require; and government documents are disclosed even when not required by the Freedom of Information Act.

then the courts are likely to become embroiled in difficult, time-consuming and, we submit, inappropriate oversight of the day-to-day operations of the United States Attorneys and the Department of Justice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977